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6                   UNITED STATES DISTRICT COURT  
7                   WESTERN DISTRICT OF WASHINGTON  
8                   AT SEATTLE

9 STEVEN LYNN BROOKS,

10                   Plaintiff,

Case No. C11-2104-JCC-JPD

11                   v.

12 STEVEN HAMMOND, *et al.*,

13                   Defendants.

14  
15                   REPORT AND RECOMMENDATION

16                   INTRODUCTION AND SUMMARY CONCLUSION

17 Plaintiff Steven Brooks is a state prisoner who is currently incarcerated at the Monroe  
18 Correctional Complex (MCC). He has filed a civil rights action under 42 U.S.C. § 1983 alleging  
19 that the named defendants denied him adequate medical care for a serious medical condition in  
20 violation of his rights under the Eighth Amendment. Plaintiff identifies the following individuals  
21 as defendants in this action: Steven Hammond, M.D., Chief Medical Officer for the Washington  
22 Department of Corrections (DOC); Kenneth Lauren, M.D., Facility Medical Director at the  
23 MCC; and, Roberta Kanive, Certified Advanced Registered Nurse Practitioner (ARNP) at the  
MCC.

Defendants have filed a motion for summary judgment seeking dismissal of the claims asserted by plaintiff in his amended complaint. Plaintiff has not filed a response to defendants' motion but has, instead, moved for voluntary dismissal of this action. Defendants oppose plaintiff's motion for voluntary dismissal. The Court, having reviewed the parties' pending motions, and the balance of the record, concludes that plaintiff's motion for voluntary dismissal should be denied, defendants' motion for summary judgment should be granted, and plaintiff's amended complaint and this action should be dismissed with prejudice.

## **BACKGROUND**

This action arises out of the treatment plaintiff received at the MCC for a medical condition involving his right hip, leg and foot. (*See* Dkt. No. 31 at 1-2.) Plaintiff complains that despite having knowledge of his serious medical condition as early as October 2006, defendants failed to provide proper medical care to relieve the chronic pain in his hip until December 2011 when hip replacement surgery was performed. (*Id.* at 2.) Defendant Kenneth Lauren, M.D., M.P.H., has submitted a declaration which details the medical care provided to plaintiff during the time period in question. (*See* Dkt. No. 39, Ex. 1.) The relevant facts concerning plaintiff's medical care are set forth below.<sup>1</sup>

On October 20, 2006, plaintiff was seen by Vickie Martin, a Certified Physician's Assistant (PA), for complaints of insomnia and irritability. (*Id.*, Ex. 1 at 3.) Plaintiff also complained at this appointment of right hip pain and increased lower back pain. (*Id.*) Because the reported hip and low back pain were new complaints, PA Martin ordered x-rays of plaintiff's lower spine and right hip. (*Id.*, Ex. 1 at 3.) MCC medical staff took x-rays on October 25, 2006

<sup>1</sup> Plaintiff has offered no evidence or argument to rebut the facts set forth in Dr. Lauren's declaration and, thus, this Court relies on those facts to provide the relevant background.

1 which revealed "mild spurring about the femoral head with mild narrowing of the hip joint space  
2 in the weight-bearing region." (Dkt. No. 39, Ex. 1 at 4.)

3 Plaintiff was seen again by PA Martin on November 13, 2006 for complaints of a  
4 "pinching sensation" in his abdomen. (*Id.*) Plaintiff indicated that the pinching sensation did not  
5 result in extreme pain. (*Id.*) PA Martin noted at this appointment that plaintiff had mild to  
6 moderate degenerative joint disease and she stressed to plaintiff the importance of taking  
7 Ibuprofen for pain relief. (*Id.*) PA Martin also referred plaintiff to an orthopedic surgeon for his  
8 hip pain. (*Id.*) At a follow-up appointment on December 21, 2006, plaintiff reported to PA  
9 Martin that he was "feeling well" and experiencing decreased pain. (*Id.*) He also indicated he  
10 was exercising daily. (*Id.*) PA Martin instructed plaintiff to return to the clinic as necessary and  
11 advised that he should follow-up with her every two months. (*Id.*)

12 On February 26, 2007, plaintiff was seen by Dr. James Swenson of the Evergreen  
13 Orthopedic Clinic for evaluation of his back, leg, and hip pain. (*Id.*) Dr. Swenson reported that  
14 plaintiff walked without a limp, that his hip had full range of motion, and that his back had mild  
15 tenderness. (*Id.*) Dr. Swenson also noted that x-rays revealed mild degenerative joint disease in  
16 plaintiff's hip and some degenerative disc disease of the lumbar spine. (*Id.*) Dr. Swenson  
17 recommended a screening MRI of plaintiff's lumbar spine based on his concern that the source  
18 of plaintiff's pain was not his hip. (*Id.*)

19 On April 11, 2007, the DOC's Care Review Committee (CRC) convened to review  
20 plaintiff's case and the medical necessity for further orthopedic evaluation, testing, and surgery.  
21 (*Id.*) PA James Jellison presented plaintiff's case to the CRC, including Dr. Swenson's  
22 recommendation for a screening MRI of plaintiff's lumbar spine. (*Id.*, Ex. 1 at 4-5.) The CRC  
23 deemed the recommended MRI not medically necessary because a course of conservative care

1 had not been exhausted. (Dkt. No. 39, Ex. 1 at 5.) The CRC suggested further conservative  
2 treatment before proceeding with surgical intervention and recommended a tapering course of  
3 corticosteroids to help relieve pain and inflammation. (*Id.*) PA Jellison thereafter prescribed  
4 Prednisone for plaintiff and noted that if there was no change in symptoms then plaintiff's case  
5 would be resubmitted to the CRC. (*Id.*)

6 Plaintiff was seen again by PA Jellison in late May 2007. (*Id.*) Plaintiff reported that his  
7 back had improved with the Prednisone and that he did not need pain medication at that time.  
8 (*Id.*) Plaintiff had a follow-up appointment with PA Jellison in late June or early July 2007 at  
9 which time plaintiff reported again that his back was doing much better. (*Id.*) PA Jellison noted  
10 that he would refer plaintiff to physical therapy. (*Id.*)

11 Plaintiff was seen by Physical Therapist (PT) William Moynihan on August 2, 2007 for  
12 an initial evaluation. (*Id.*) Plaintiff reported to PT Moynihan that he suffered chronic back  
13 problems and also that shoe orthotics, exercises, and oral steroids had helped a lot with his pain.  
14 (*Id.*) PT Moynihan recommended some stretching exercises for plaintiff's hip and lower back.  
15 (*Id.*)

16 Members of the MCC medical staff continued to treat plaintiff's pain between late 2007  
17 and late 2009 using conservative treatments such as custom designed shoe inserts and topical  
18 pain relief cream, with varying degrees of success. (*Id.*)

19 On October 28, 2009, plaintiff was seen by ARNP Roberta Kanive. (*Id.*) Plaintiff  
20 reported at that time that he was experiencing increased pain in his right hip but that he was not  
21 using any pain support. (Dkt. No. 39, Ex. 1 at 5-6.) ARNP Kanive prescribed Oxycodone to  
22 treat plaintiff's pain and she ordered another x-ray of plaintiff's right hip. (*Id.*, Ex. 1 at 6.) The  
23 x-ray, taken a few days later on November 4, 2009, showed "moderate narrowing of the

1 superolateral joint" indicating "mild to moderate changes." (Dkt. No. 39, Ex. 1 at 6.) After  
2 reviewing this x-ray, ARNP Kanive prescribed an anti-inflammatory, Etodolac, for management  
3 of plaintiff's pain and inflammation. (*Id.*)

4 Plaintiff was seen again by ARNP Kanive on April 13, 2010 at which time plaintiff  
5 continued to complain of hip pain and reported that his shoe inserts were not helping with the  
6 pain. (*Id.*) Plaintiff also reported that he had been using Ibuprofen to relieve pain. (*Id.*) ARNP  
7 Kanive recommended that plaintiff use a cane to help relieve his pain and plaintiff agreed. (*Id.*)

8 On May 28, 2010, plaintiff met with ARNP Kanive to address management of his hip  
9 pain. (*Id.*) Plaintiff indicated during that appointment that the Ibuprofen seemed to help more  
10 than the previously prescribed Etodolac so ARNP Kanive prescribed 800mg Ibuprofen for  
11 plaintiff for a period of four months. (*Id.*) At a follow-up appointment on August 20, 2010,  
12 plaintiff reported to ARNP Kanive that his right hip pain was significant. (*Id.*) ARNP Kanive  
13 prescribed Oxycodone to manage the pain and requested that plaintiff follow-up in two months.  
14 (*Id.*) Plaintiff followed-up again with ARNP Kanive on October 27, 2010, at which time  
15 plaintiff reported that the pain medicine had helped his right hip but did not alleviate the pain  
16 completely. (*Id.*) ARNP Kanive made no further recommendations at that time given plaintiff's  
17 report that the pain had improved. (*Id.*)

18 On June 6, 2011, plaintiff was seen by the MCC medical staff for increased pain in his  
19 right hip. (*Id.*) Plaintiff reported that the pain had increased over the last six months and the  
20 medical assistant scheduled an appointment for plaintiff with ARNP Kanive on June 14, 2011.  
21 (*Id.*) At that appointment, plaintiff reported that his pain was constant and he expressed concern  
22 that continued pain medication would damage his liver. (*Id.*, Ex. 1 at 7.) ARNP Kanive ordered  
23 a repeat x-ray of plaintiff's right hip to check for advancement of his degenerative disease. (*Id.*)

1 This x-ray, taken on June 22, 2011, showed a narrowing of the upper joint space and moderate  
2 degenerative spurring. (Dkt. No. 39, Ex. 1 at 7.) These results were consistent with moderate  
3 osteoarthritis and possible avascular necrosis (AVN), or loss of bone on the joint surface. (*See*  
4 *id.*, Ex. 1 at 3 and 7.)

5 Plaintiff returned for a follow-up appointment with ARNP Kanive on July 5, 2011. (*Id.*,  
6 Ex. 1 at 7.) ARNP Kanive noted at that time that plaintiff was agreeable to pain management.  
7 (*Id.*) She also noted that plaintiff continued to use a cane and was working pushing a motorized  
8 supply cart. (*Id.*) ARNP Kanive ordered a routine EKG in anticipation of possible hip surgery  
9 to screen for any cardiac problems. (*Id.*) Plaintiff saw ARNP Kanive a few days later on July 9,  
10 2011 and agreed at that time to try a new drug, Venlafaxine, for his hip pain pending a  
11 determination by the CRC about a referral for an orthopedic evaluation. (*Id.*)

12 On August 3, 2011, plaintiff's case was presented again to the CRC for orthopedic  
13 evaluation and possible right hip replacement. (*Id.*) The CRC at that time approved plaintiff's  
14 case as a Level I medically necessary intervention and proposed a referral to an orthopedic  
15 surgeon for a hip replacement evaluation. (*Id.*)

16 Shortly thereafter, on August 15, 2011, plaintiff had a consult with Dr. Kenneth Lin, an  
17 orthopedic surgeon. (*Id.*) Dr. Lin noted that plaintiff had degenerative arthritis of the right hip  
18 and he recommended a "possible steroid injection into the right hip thinking it could afford him  
19 some temporary comfort for a few months." (*Id.*) After discussing Dr. Lin's recommendation  
20 with ARNP Kanive, plaintiff indicated that he would prefer hip replacement over the steroid  
21 injections. (*Id.*) ARNP Kanive noted that she would plan a phone consult with Dr. Lin. (*Id.*)

22 On September 3, 2011, plaintiff suffered a fall down stairs at MCC. Plaintiff was seen by  
23 the MCC medical staff and it was noted that plaintiff had suffered some swelling over the front

1 of his eighth and ninth ribs. (Dkt. No. 39, Ex. 1 at 8.) Plaintiff was prescribed Oxycodone to  
2 treat the pain and was advised to continue ice and rest. (*Id.*)

3 Plaintiff was seen by ARNP Kanive on September 19, 2011. (*Id.*) Plaintiff reported that  
4 the pain in his hip had become unrelenting but that it was also very much helped by the use of  
5 the Venlafaxine. (*Id.*) ARNP Kanive noted that she would consult to schedule plaintiff's hip  
6 surgery. From late-September to mid-December 2011, MCC medical staff prepared plaintiff for  
7 his upcoming surgery. (*Id.*) ARNP Kanive monitored plaintiff's blood pressure and platelet  
8 levels, and reduced his medication, all of which were necessary steps to ensure the success of,  
9 and the ability to carry out, his surgery. (*Id.*) Plaintiff underwent hip replacement surgery on  
10 December 13, 2011, which was followed by physical therapy rehabilitation. (*Id.*)

11 Plaintiff signed his original complaint in this action on December 4, 2011, prior to his  
12 surgery, though the pleading was not received by the Court for filing until December 15, 2011.  
13 (See Dkt. No. 1.) Plaintiff's original complaint was served on defendants in February 2012, and  
14 defendants filed a timely answer to the complaint on April 3, 2012. (See Dkt. Nos. 8-15, 18, and  
15 22.) On April 5, 2012, this Court issued a pretrial scheduling order in which a discovery  
16 deadline of July 3, 2012 was set. (Dkt. No. 24.)

17 On June 20, 2012, the parties filed a stipulated motion to amend the complaint and, on  
18 July 30, 2012, defendants moved for issuance of a new pretrial scheduling order because  
19 plaintiff's amended complaint had not yet been accepted for filing. (Dkt. Nos. 27 and 28.) On  
20 September 14, 2012, this Court issued an Order granting the parties' stipulated motion to amend  
21 and defendants' motion for issuance of a new pretrial scheduling order. (Dkt. No. 29.) On the  
22 same date, the Court issued an Amended Pretrial Scheduling Order which established a new  
23 discovery deadline of December 14, 2012. (Dkt. No. 30.)

1 On November 19, 2012, plaintiff filed a motion seeking to extend the discovery deadline  
2 again. (Dkt. No. 33.) On January 22, 2013, the Court granted plaintiff's motion for an extension  
3 time and extended the discovery deadline to April 22, 2013. (Dkt. No. 41.) At the same time,  
4 the Court re-noted defendants' recently filed motion for summary judgment to May 31, 2013.  
5 (See *id.*) On April 23, 2013, the Court received from plaintiff a motion for voluntary dismissal  
6 and defendants thereafter filed a response in opposition to plaintiff's motion. (Dkts. No. 42 and  
7 43.) Plaintiff has been advised of the requirements of Rule 56 (see Dkt. No. 40) but has filed no  
8 response to defendants' motion for summary judgment. Defendants' motion for summary  
9 judgment and plaintiff's motion for voluntary dismissal are now ripe for review.

10 DISCUSSION

11 Motion for Voluntary Dismissal

12 Plaintiff, in lieu of filing a response to defendants' summary judgment motion, filed a  
13 motion for voluntary dismissal of this action without prejudice pursuant to Fed. R. Civ. P.  
14 41(a)(2). (Dkt. No. 42.) Plaintiff asserts in his motion that voluntary dismissal without prejudice  
15 is warranted because of the "unique circumstances of this case" and the limitations inherent in  
16 attempting to litigate an action while incarcerated. (Dkt. No. 42.) Plaintiff indicates that he is  
17 scheduled to be released from custody in April 2014 and he intends to retain legal counsel and  
18 orthopedic surgeons upon his release from custody so that this matter can be properly litigated.  
19 (Dkt. No. 42.)

20 Defendants oppose plaintiff's motion to dismiss and request that the Court proceed to  
21 disposition of their pending summary judgment motion. (Dkt. No. 43.) Defendants request, in  
22 the alternative, that plaintiff's motion for voluntary dismissal be granted, and that the dismissal  
23 be with prejudice. (*Id.*)

1 Rule 41(a)(2) of the Federal Rules of Civil Procedure allows a plaintiff to dismiss an  
2 action without prejudice at any time pursuant to an order of the court, and subject to any  
3 conditions the court deems proper. When ruling on a motion to dismiss without prejudice, the  
4 court must determine whether the defendant will suffer some plain legal prejudice as a result of  
5 the dismissal. *Hyde & Drath v. Baker*, 24 F.3d 1162, 1169 (9<sup>th</sup> Cir. 1994); *Hamilton v Firestone*  
6 *Tire & Rubber Co.*, 679 F.2d 143, 145 (9<sup>th</sup> Cir. 1982). Courts have identified the following  
7 factors to be considered in deciding a motion brought under Rule 41(a)(2): (1) the defendant's  
8 effort and expense involved in preparing for trial; (2) excessive delay and lack of diligence on  
9 the part of the plaintiff in prosecuting the action; (3) insufficient explanation of the need to take a  
10 dismissal; and, (4) the fact that summary judgment has been filed by the defendant. See *United*  
11 *States v. Berg*, 190 F.R.D. 539, 543 (E.D. Cal. 1999); see also *Paulucci v. City of Duluth*, 826  
12 F.2d 780, 783 (8<sup>th</sup> Cir. 1987); *Grover v. Eli Lilly & Co.*, 33 F.3d 716, 718 (6<sup>th</sup> Cir. 1994); *United*  
13 *States v. Outboard Marine Corp.*, 789 F.2d 497, 502 (7<sup>th</sup> Cir. 1986).

14 Under the circumstances of this case, these factors, in total, weigh in favor of defendants.  
15 Defendants note in their opposition to plaintiff's motion for voluntary dismissal that they have  
16 produced 500 pages in discovery and have engaged in "weighty motion practice." While the  
17 Court does not necessarily endorse defendants' description of the motion practice in this case,  
18 defendants have, in fact, diligently responded to a number of motions filed by plaintiff, they have  
19 produced a significant amount of discovery, and they have themselves filed a motion for  
20 summary judgment.

21 Plaintiff has not been so diligent in moving this action forward. This Court has extended  
22 the discovery deadline twice in this matter, the first time to accommodate plaintiff's desire to  
23 amend his complaint and the second time to permit plaintiff to conduct a final round of discovery

1 before having to respond to defendants' summary judgment motion. Despite the Court granting  
2 plaintiff an additional 90 days to conduct discovery in January 2013, plaintiff propounded no  
3 additional discovery during that period and, in fact, took no action other than to file the instant  
4 motion for voluntary dismissal after discovery had closed.

5 In addition to his failure to diligently prosecute this action, plaintiff also fails to offer a  
6 sufficient explanation of his need to take a dismissal. While plaintiff suggests in his motion for  
7 voluntary dismissal that the circumstances of his case are unique, his case is actually a relatively  
8 straightforward one which presents no complicating factors other than that plaintiff is  
9 incarcerated, a fact of which he was certainly aware at the time he elected to file this action.

10 For the reasons set forth above, this Court is not persuaded that dismissal of this matter  
11 without prejudice under Fed. R. Civ. P. 41(a)(2) is appropriate and therefore recommends that  
12 plaintiff's motion for voluntary dismissal be denied.

13 Motion for Summary Judgment

14 Summary judgment is proper only where "the pleadings, depositions, answers to  
15 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
16 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter  
17 of law." Fed.R.Civ.P. 56(c). The moving party has the burden of demonstrating the absence of a  
18 genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257  
19 (1986). Genuine disputes are those for which the evidence is such that a "reasonable jury could

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1 return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 257. Material facts are those  
 2 which might affect the outcome of the suit under governing law. *Id.*

3 In response to a properly supported summary judgment motion, the nonmoving party  
 4 may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts  
 5 demonstrating a genuine issue of fact for trial and produce evidence sufficient to establish the  
 6 existence of the elements essential to his case. *See Fed. R. Civ. P. 56(e)*. A mere scintilla of  
 7 evidence is insufficient to create a factual dispute. *See Anderson*, 477 U.S. at 252. In ruling on a  
 8 motion for summary judgment, the court is required to draw all inferences in a light most  
 9 favorable to the nonmoving party. *Id.* at 248. The court may not weigh the evidence or make  
 10 credibility determinations. *Anderson*, 477 U.S. at 248.

11 **Eighth Amendment**

12 Plaintiff alleges in his amended complaint that his Eighth Amendment rights were  
 13 violated when defendants, having knowledge of his serious medical condition, delayed surgery to  
 14 repair his damaged right hip leaving him in chronic pain for several years.

15 The Eighth Amendment imposes a duty upon prison officials to provide humane  
 16 conditions of confinement. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). This duty includes  
 17 ensuring that inmates receive adequate medical care. *Id.* In order to establish an Eighth  
 18 Amendment violation, a prisoner must satisfy a two-part test containing both an objective and a  
 19 subjective component. The Eighth Amendment standard requires proof that (1) the alleged  
 20 wrongdoing was objectively "harmful enough" to establish a constitutional violation; and (2) the  
 21 prison official acted with a sufficiently culpable state of mind. *Id.*

22 The objective component of an Eighth Amendment claim is "contextual and responsive  
 23 to 'contemporary standards of decency.'" *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (quoting

1     *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). The state of mind requirement under the subjective  
2 component of the Eighth Amendment standard has been defined as "deliberate indifference" to  
3 an inmate's health or safety. *Farmer*, 511 U.S. at 834. Under the "deliberate indifference"  
4 standard, a prison official cannot be found liable for denying an inmate humane conditions of  
5 confinement unless the official knows of and disregards an excessive risk to inmate health or  
6 safety. *Id.* at 837.

7                 It is well established that differing opinions on medical treatment do not amount to a  
8 violation under the Eighth Amendment. *Jackson v. McIntosh*, 90 F.3d 330, 332 (9<sup>th</sup> Cir. 1996)  
9 (citing *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989)). In order to prevail on an Eighth  
10 Amendment claim in these circumstances, a plaintiff must show "that the course of treatment the  
11 doctors chose was medically unacceptable under the circumstances . . . and . . . that they chose  
12 this course in conscious disregard of an excessive risk to plaintiff's health." *Jackson*, 90 F.3d at  
13 332 (citations omitted).

14                 Defendants argue in their motion for summary judgment that plaintiff's Eighth  
15 Amendment claim fails because the undisputed expert medical testimony shows that defendants  
16 appropriately treated plaintiff's medical condition. As noted above, defendants have submitted  
17 in support of their summary judgment motion the declaration of defendant Kenneth Lauren,  
18 M.D., which details the medical treatment provided plaintiff for his ailing right hip between  
19 October 2006 and December 2011. (Dkt. No. 39, Ex. 1.)

20                 Dr. Lauren maintains in his declaration that defendants did not unnecessarily delay hip  
21 replacement surgery for plaintiff but, rather, employed medically appropriate conservative  
22 treatment for his gradually deteriorating hip condition until the joint was ripe for replacement.  
23 (See *id.*, Ex. 1 at 2.) Dr. Lauren states that joint replacement surgery should only be done when

1 "the joint is end-stage and 'ripe' for surgery and conservative measures have failed." (Dkt. No.  
2 39, Ex. 1 at 2.) He explains that premature hip replacement, particularly for someone of  
3 plaintiff's age, can be detrimental in the long run because it can put the individual in the position  
4 of having the artificial hip joint expire thereby necessitating a second hip replacement at a later  
5 date. (*Id.*, Ex. 1 at 2-3.)

6 Dr. Lauren notes that defendants and other MCC medical personnel appropriately  
7 monitored the changes in plaintiff's hip joint through the use of x-rays and properly considered  
8 and recommended conservative treatments including over-the-counter pain medications,  
9 Oxycodone, steroids, topical pain relief creams, customized orthotic shoe inserts, physical  
10 therapy, and use of a cane. (*Id.*, Ex. 1 at 2.) Dr. Lauren states that when plaintiff's June 2011 x-  
11 ray revealed possible avascular necrosis (AVN), his case was then properly presented to the  
12 CRC, and approval for surgery was granted, because AVN can cause rapid progression of  
13 osteoarthritis.<sup>2</sup> (Dkt. No. 39, Ex. 1 at 3.) According to Dr. Lauren, a hip replacement was not  
14 medically necessary prior to the evidence of possible AVN. (*Id.*)

15 Plaintiff makes no showing that the course of treatment defendants chose was medically  
16 unacceptable under the circumstances and, in fact, the evidence in the record suggests the  
17 contrary. Once conservative treatment options were exhausted, and the joint was deemed ripe  
18 for replacement, the joint was replaced. That plaintiff disagrees with the chosen course of  
19 treatment, does not establish a constitutional violation. There is simply no evidence in the record  
20 that the alleged delay in authorizing joint replacement surgery for plaintiff reflects a conscious

21  
22 <sup>2</sup> Dr. Lauren notes that even after plaintiff's x-rays revealed possible AVN in June 2011, an outside  
23 consulting orthopedic surgeon, Dr. Lin, still recommended a conservative course of treatment with a steroid  
injection into the hip in August 2011. (Dkt. No. 39, Ex. 1 at 7.) Nonetheless, a complete hip replacement was  
approved and performed. (*Id.*, Ex. 1 at 7-8.)

1 disregard of an excessive risk to plaintiff's health. Plaintiff has not established that defendants  
2 were deliberately indifferent to his serious medical needs and, thus, defendants are entitled to  
3 summary judgment on plaintiff's Eighth Amendment claim.

4 CONCLUSION

5 Based upon the foregoing, this Court recommends that plaintiff's motion for voluntary  
6 dismissal be denied, that defendants' motion for summary judgment be granted, and that  
7 plaintiff's amended complaint and this action be dismissed with prejudice. A proposed order  
8 accompanies this Report and Recommendation.

9 DATED this 17th day of July, 2013.

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11 JAMES P. DONOHUE  
12 United States Magistrate Judge

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